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ESSAY

**MORE THAN A SECOND CHANCE:
AN ALTERNATIVE EMPLOYMENT APPROACH TO
REDUCE RECIDIVISM AMONG CRIMINAL EX-
OFFENDERS**

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I. Introduction

Since the mid-1970s, the United States has engaged in a “race to incarcerate” that has resulted in a prison population expanded to a level previously unknown in any democratic society.² This rise in imprisonment came about primarily because of “tough on crime” policies that were intended to enhance public safety and respond to the demands of an increasingly conservative population.³ This record three-decade increase in imprisonment has resulted in an average annual prison population rate of more than 2,000,000 people behind bars in United States jails and prisons, and that figure increases exponentially each year.⁴ During this thirty-year period, the number of prison inmates has

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² Marc Mauer, Thinking about Prison and its Impact in the Twenty-First Century, 2 OHIO ST. J. CRIM. L. 607 (2005).

³ *Id.* Other factors analysts say are relative to the origin of this mass incarceration include political leaders’ electoral concerns, a means of social control over the population of African-Americans after gaining freedoms mid-twentieth century, and a move to control a serious social problem in a post-modern state. *Id.*

⁴ *Id.*

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increased over 600%.⁵ In 2002, over 7,000,000 people were incarcerated in federal, state, or local jails or prisons nationwide.⁶ One in every thirty-seven adults, nearly six million people, has spent time in prison.⁷

The problems of mass incarceration are prevalent across the social spectrum but are especially acute in certain segments of society. In 2000, the incarceration rate for young African-American men was nearly 10%, compared to just over 1% for Caucasian men in the same age group.⁸ Young African-American high school dropouts have a 60% chance of being imprisoned during their lifetimes.⁹ When asked what he would do about inner-city youth and violence, a 2008 presidential candidate remarked: “We cannot build enough prisons to solve this problem. And the idea that we can keep incarcerating and keep incarcerating—pretty soon we’re not going to have a young African-American male population in America. They’re all going to be in prison or dead. One of the two.”¹⁰ His comments undeniably reflect the broader social imperative to take steps to stop re-incarcerating individuals, regardless of their race, and aid in the successful reentry efforts of those recently released from prison.

⁵ Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 618 (2005). Imprisonment has changed from a punishment primarily for the worst offenders to one covering a greater range of crimes for a much larger segment of the population. *Id.*

⁶ Recidivism Reduction and Second Chance Act of 2007, H.R. 1593, 110th Cong. § 3(1) (2007).

⁷ Christopher Stafford, Note, *Finding Work: How to Approach the Intersection of Prisoner Reentry, Employment, and Recidivism*, 13 GEO. J. ON POVERTY L. & POL’Y 261 (2006).

⁸ Pager, *supra* note 5, at 619.

⁹ *Id.* at 619-20.

¹⁰ Remarks made by Sen. John Edwards, 2008 presidential contender, during MTV/MySpace Presidential Dialogue Forum (Sept. 27, 2007), <http://think.mtv.com/044FDFFF0098989A001700989F55/> (last visited Dec. 11, 2009).

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The problems with mass incarceration addressed in this paper are those that begin to surface when an inmate steps outside the prison gate and re-enters the community. Once a prison term is completed, the transitory reentry period is almost always filled with difficulties for the ex-offender.¹¹ With few exceptions, all of the people currently behind bars in the United States will eventually leave jail or prison and face the challenges of reintegration.¹² Each year approximately 630,000 individuals are released from prisons, juvenile detention facilities, or jails back into the community.¹³ Unfortunately, approximately two-thirds of those released will be rearrested within three years of release,¹⁴ leading to a disturbingly large and ever-growing number of individuals entering and leaving society through the jailhouse doors.

More precisely, two out of every three formerly incarcerated individuals will cycle in and out of prison on a fairly regular basis. They become recidivist offenders. When the unacceptably high rate of recidivism is significantly lowered, society's best interests are served.¹⁵ Averting the perpetuation of increasing recidivist levels, such as those existing today, is undeniably beneficial to all citizens regardless of their political alliances or social reckonings.

¹¹ Mauer, *supra* note 2, at 609.

¹² Stafford, *supra* note 7, at 261.

¹³ Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1083 (2004).

¹⁴ Stafford, *supra* note 7, at 261.

¹⁵ Mauer, *supra* note 2, at 613-14. Mauer suggests that imprisonment dehumanizes persons convicted of crime and poses financial strains, psychological burdens, and social stigma on those family members they leave behind. Additionally, public safety is negatively affected and "neighborhoods become more destabilized as people cycle in and out of prison on a regular basis." *Id.*

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An inmate recently released from prison needs employment to attain self-sufficiency and to be better able to avoid future involvement in criminal activity. Ex-offenders consistently voice that finding suitable employment is their primary concern and is even more important than staying off drugs or maintaining good physical health.¹⁶ Case studies and case law show that maintaining stable employment can lead to successful reentry.¹⁷ Without income and earning potential from a job, an ex-offender is likely to return to crime as a means of support.¹⁸ Employment is one of the strongest predictors that an ex-offender will be successful after release and not backslide into crime.¹⁹

Employment services provided after release, such as those available at the Safer Foundation in Chicago, have been shown to successfully reduce recidivism by over 60%.²⁰ Legislation passed in 2007 will make available a plethora of services to a recently released ex-offender—especially relevant are job training, mentoring, and monitoring programs—that should assist him in his often

¹⁶ Marta Nelson, *The First Month Out: Post-Incarceration Experiences in New York City*, 13 (1999), available at http://www.vera.org/publication_pdf/first_month_out.pdf.

¹⁷ See Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281 (2002) (author case study during an internship at a mental health counseling center where ex-felon was able to live a meaningful, productive life because of his job in a truck yard and the help from a loyal boss); see also *Haddock v. City of New York*, 553 N.E.2d 987, 992 (N.Y. 1990) (noting that an opportunity for stable employment may mean the difference between recidivism and rehabilitation).

¹⁸ George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.americanrhetoric.com/speeches/stateoftheunion2004.htm>. In his 2004 State of the Union address, George W. Bush recognized the recidivism crisis when he stated that if the thousands of inmates released into the community in 2004 were unable to find work, they would more than likely re-commit and be returned to prison. *Id.*

¹⁹ Pager, *supra* note 5, at 619.

²⁰ Stafford, *supra* note 7, at 261.

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insurmountable task of looking for a job.²¹ The purpose of this paper is to examine the creation of federal employment for released offenders under certain circumstances so as to reduce elevated recidivism rates until appropriate federal legislation providing active and adequate protection for ex-offenders seeking employment can be enacted.²²

In Part II, this paper defines the impacts of recidivism, the costs to society, and employment as a way to lower recidivism. Part III explores a new generation of collateral sanctions imposed after a prison term is completed, which create serious obstacles to employment for recently released prisoners. Part IV focuses on statutory schemes, enacted and proposed, designed to prevent discrimination in hiring ex-offenders and to provide employment assistance and transition services to ex-offenders. Part V looks at federally mandated public employment schemes from historical and present perspectives, their use and purpose, and the general effectiveness of each. Part VI discusses a proposed solution of public employment for ex-offenders in limited circumstances to lower unacceptably high recidivism levels as an interim measure prior to implementation of proposed federal legislation that will adequately and effectively deal with recidivism.

II. The Impacts of Recidivism and Ex-Offender Employment

To fully understand the relationship of employment to an ex-offender, one must explore the nature of recidivism and its impacts on individuals and the community.

²¹ Second Chance Act of 2007, 42 U.S.C. § 17501 (2007).

²² This writer recognizes that recidivism is a complex problem caused by several factors. The purpose of this paper is to focus on employment as one factor influencing the overall rate of recidivism. In sum, by facilitating the employment of ex-offenders, the number of recidivist offenders will be reduced and the overall prison population will be correspondingly lessened.

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Recidivism is defined as a “tendency to relapse into a habit of criminal activity or behavior,” and a recidivist is defined as an individual “who has been convicted of multiple criminal offenses . . . a repeat offender.”²³ When society denies an ex-offender nearly any chance at successful reintegration into the community, too often he will give up trying to succeed through legitimate efforts and will return to crime as a means of support. He becomes a recidivist. A recent study reported that 46% of state inmates and 27% of federal inmates were either on parole or on probation at the time of their most recent arrest.²⁴ Given that massive numbers of persons are arrested, incarcerated, released, and then re-arrested in the pernicious cycle of recidivism, the unavoidable costs of recidivism to families and communities are decidedly difficult, if not impossible, to quantify.

Imprisonment imposes strains and burdens, including financial, psychological, and social, on an inmate’s friends and family.²⁵ It is estimated that 1.5 million children have a parent in prison.²⁶ When the incarcerated parent is the mother of a child, the child’s primary caregiver is removed. Sometimes the child will be lucky and a relative will assume caregiving responsibilities, but others are not so lucky and will be placed in foster care.²⁷ Additionally, children in low-income communities of color are much more likely to face future incarceration.²⁸ When there is little around them demonstrating success in the traditional sense, it is reasonable to assume that children will, in

²³ BLACK’S LAW DICTIONARY 1297 (8th ed. 2004).

²⁴ U.S. Government Accountability Office, *State and Federal Prisoners: Profiles of Inmate Characteristics in 1991 and 1997*, available at <http://www.gao.gov/docsearch/abstract.php?rptno=GGD-00-117>.

²⁵ Mauer, *supra* note 2, at 611.

²⁶ *Id.*

²⁷ *Id.* at 612.

²⁸ *Id.*

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certain instances, learn that working hard is not always a guaranteed road to success. Children are the building blocks of families and communities. When mass incarceration of parents causes children to be denied adequate care and support, the overall structural damage to families and the resulting deterioration and destabilization of communities has an undeniably strong negative impact on public safety.

The effects of mass incarceration on public safety have been widely debated and are highly complex. The recent “war on drugs” is recognized as one of the most significant contributors to the increase in prison population.²⁹ A recent study showed that 62% of federal inmates were in prison on convictions related to drug possession.³⁰ When a local drug dealer is sent away to prison, no vacuum in the drug-dealer trade is created in a community. As long as there is a market for drugs in a community, there is almost always a potential dealer ready to step into the shoes of a dealer sent to prison. The point at which mass incarceration of drug dealers becomes an unacceptable cost instead of a benefit to society is when the constant source of replacement drug dealers and the recycling of drug dealers in and out of prison combine to negate any short-term effects of increased criminal prosecutions, which are otherwise meant to ensure public safety. In short, the high concentration of inmates with drug possession convictions and the elevated recidivism trends do not positively promote, but instead negatively impact, public safety.

Recidivism trends have an impact that can be measured in economic terms. Costs vary widely among jurisdictions, but it is estimated that the average cost of incarcerating one

²⁹ *Id.* at 613.

³⁰ Government Accounting Office, *Prisoner Releases: Trends and Information on Reintegration*, available at <http://www.gao.gov/docsearch/abstract.php?rptno=GAO-01-483>.

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individual for one year is \$40,000.³¹ Research has shown that in Brooklyn, New York, the yearly cost to taxpayers for imprisonment of individuals in one certain, densely populated city block area is approximately \$1 million.³² National expenditures on corrections alone, not including costs of arrest and prosecution, increased from \$9 billion in 1982 to \$59.6 billion in 2002.³³ If levels of offenders and re-offenders are reduced when full employment is used as a starting point in rehabilitation, the resulting savings in actual dollar costs to taxpayers is not difficult to discern.

Recidivism is impacted when ex-offenders achieve full employment. An inmate returning to the community needs a job to pay for daily living expenses and to begin rebuilding his sense of identity and self-worth outside the prison environment. If he finds a stable job, an ex-offender will not likely need to return to crime as a means of support. However, for an ex-offender the task of locating employment that will sustain and promote a functional daily life is extraordinarily difficult. Finding and maintaining gainful employment is a dismal prospect for ex-offenders even when the national economy is healthy. The national unemployment rate in 1999 was 4.2% with low-wage sector earners other than ex-offenders having an unemployment rate of 26%.³⁴ The unemployment rate for ex-offenders was approximately 33%.³⁵ Following release from incarceration, lifetime earnings are expected to decrease between 10% and 20%.³⁶ For recently released

³¹ 153 CONG. REC. H5691 (daily ed. May 23, 2007) (statement of Rep. Davis).

³² Mauer, *supra* note 2, at 617.

³³ Recidivism Reduction and Second Chance Act of 2007, S. 1060, 110th Cong. § 3(4) (2007) (as introduced to the U.S. Senate, March 29, 2007).

³⁴ Stafford, *supra* note 7, at 263.

³⁵ *Id.*

³⁶ *Id.* at 264.

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prisoners, imprisonment is a substantial handicap to finding employment and achieving successful reintegration.

Proponents of mass incarceration may suggest that it is an unfortunate but necessary consequence of a policy to control crime. However, as recidivism continues to increase, it is becoming more apparent that any gains realized by mass incarceration will be more than offset by the negative impacts of recidivism. When society takes steps to remove obstacles confronting ex-offenders seeking employment, recidivism will be reduced and its negative impact and attendant costs will inevitably be diminished.

III. Obstacles to Employment for Ex-Offenders

Life outside prison walls for a recently released prisoner is filled with a myriad of indirect and direct barriers to employment resulting from his imprisonment. Collectively known as “collateral consequences” of conviction,³⁷ such obstacles make it clear why a criminal conviction is a substantial hindrance to an ex-offender’s success in outside life. These obstacles are often referred to as “invisible punishments” because they are rarely reviewed in the courtroom when they are meted out and equally rarely discussed in public policy dialogue.³⁸ Barriers to employment take various forms and can lead to an ex-offender’s reduced expectation of employment or an outright denial of the opportunity to apply for a job.³⁹ Consequently, an ex-offender is effectively punished twice—first behind bars for the crime for which he was convicted and then by the collateral consequences of that

³⁷ Stafford, *supra* note 7, at 266. Collateral consequences are civil sanctions placed on ex-offenders that take many forms and may directly and intentionally limit employment options. *Id.*

³⁸ Mauer, *supra* note 2, at 608.

³⁹ Pinard, *supra* note 13, at 1075. Collateral consequences include sanctions prohibiting various forms of employment, employment-related licensing, and deportation for non-citizens. *Id.*

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conviction, which act to deny him employment and a chance to succeed in life outside the prison walls.

A. Civil Barriers to Ex-Offender Employment

From the moment a defendant is found guilty of a felony, his legal status is automatically and essentially permanently changed.⁴⁰ The civil collateral consequences that flow from his criminal conviction are sanctions that may exist at the federal or state level.⁴¹ The most basic and common civil consequence of conviction is the inability of a felon to vote.⁴² Additionally, collateral sanctions going beyond sentencing enhancements create serious barriers to recovery long after an ex-offender has completed his sentence.⁴³ Depending on the state in which one lives, an 18 year-old, first-time offender convicted of felony drug possession may be permanently denied public housing and other federal welfare benefits, including medical treatment under Medicaid.⁴⁴

Under federal law, he will be denied eligibility for educational loans because of his drug offense, regardless of whether the conviction was for a felony or misdemeanor.⁴⁵ Denial of a handgun license and, in some states, deportation for non-citizens are examples of other collateral consequences of conviction.⁴⁶ The collateral consequences of a conviction combine and leave an ex-offender with few chances at success because he is denied access to housing,

⁴⁰ Stafford, *supra* note 7, at 265.

⁴¹ Pinard, *supra* note 13, at 1073.

⁴² Stafford, *supra* note 7, at 266. For a majority of the civil disabilities, the only hope of removing the obstacle is a pardon or official sealing of a criminal record. *Id.*

⁴³ Mauer, *supra* note 2, at 608-09.

⁴⁴ *Id.* at 610.

⁴⁵ Pinard, *supra* note 13, at 1077.

⁴⁶ *Id.* at 1074.

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cannot improve his education level, and cannot get adequate medical care to remain healthy. These collateral consequences have an economic impact and effect on his ability to successfully reintegrate into society through employment that is impossible to ignore.

B. Social Barriers to Ex-Offender Employment

The social consequences of conviction are those the ex-offender encounters through daily interactions with others, especially when dealing with prospective employers. An ex-offender most likely leaves prison with precious few resources. Not having proper identification documents, transportation, or professional attire⁴⁷ makes his presentation to a prospective employer all the more difficult. Employers may be reluctant to hire an ex-offender for a variety of reasons.⁴⁸ Employers can be held liable for negligent hiring and retention liability due to wrongful employee conduct.⁴⁹ Additionally, workplace violence⁵⁰ increasingly puts employers, as the “deeper

⁴⁷ See Stafford, *supra* note 7, at 269. The reluctance of employers to hire applicants with criminal records has been addressed in some states. *Id.* Those states that have acted to limit criminal records in hiring decisions are addressed in more detail in Part III.

⁴⁸ Leavitt, *supra* note 17, at 1286. Employers may attempt to use criminal records to deny employment due to negligent hiring and retention liability or out of fear that possible conduct on the part of ex-offenders might subject them to liability. *Id.*

⁴⁹ *Id.* at 1286.

⁵⁰ A detailed discussion of all factors leading to negligent hiring and retention liability for employers is beyond the scope of this paper. For a more comprehensive analysis of this topic, see William C. Smith, *Victims of Omission: Employers Can Face Liability for Negligent Hiring Practices When Workers Commit Acts of Violence*, 85 A.B.A. J. 32 (1999).

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pockets defendants,” at risk of financial liability that can sometimes lead to business bankruptcy.⁵¹

Possibly as a result of fear of liability on the part of an employer, a recent survey of employers in four major metropolitan areas reflects that hiring preferences for most employers are for those without criminal records: only 12.5% of employers said they would *definitely* accept an application from an ex-offender.⁵² In the same survey, a slightly higher percentage (25.9%) was marginally less fearful and said they *probably* would look at an application from an ex-offender.⁵³ When an employer, fearing liability for hiring an ex-offender, is presented with an ex-offender applicant who likely is not professionally dressed or well-credentialed, the employer may relegate the ex-offender to a lesser footing than non-offender applicants.

C. Statutory Barriers to Ex-Offender Employment

The collateral consequences that most directly affect an ex-offender’s ability to find employment are those statutory schemes barring felons from obtaining an occupational or professional license.⁵⁴ Quite often licenses are required by states and municipalities for an individual seeking to enter a regulated trade, business, or occupation, thus making the ability to obtain a license in any of those areas vital to employment. Lack of a valid occupation or professional license can prevent work opportunities in fields as diverse as becoming a bartender, a beautician, a plumber, an

⁵¹ Leavitt, *supra* note 17, at 1301.

⁵² Jocelyn Simonson, *Rethinking “Rational Discrimination” Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL’Y 283, 284 (2006) (emphasis added).

⁵³ *Id.*

⁵⁴ Stafford, *supra* note 7, at 266.

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ambulance driver, a health care worker, a real estate appraiser, a telemarketer, and others.⁵⁵

Additionally, if an ex-offender wants to go into business with another ex-offender, for example, he may be prevented from doing so by licensing restrictions affecting the scope of a business, especially in a partnership, where a character component may be used.⁵⁶ In some states, an ex-offender is precluded from public employment for crimes of “moral turpitude” or crimes related to the employment sought.⁵⁷ Once an individual has paid his debt to society, it makes little sense to punish him again with licensing and other restrictions to full employment after his release.

IV. Federal Legislation Affecting Ex-Offender Employment

The federal government has weighed in on the question of criminal record discrimination in an employment setting through disparate impact analysis under Title VII of the Civil Rights Act of 1964.⁵⁸ The federal civil rights law specifically prohibits employers from classifying, limiting, or segregating applicants or employees in such a way that would actually deprive or tend to deprive any individual of employment opportunities because of race, color, religion,

⁵⁵ *Id.* at 267.

⁵⁶ Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities* 71 N.D. L. REV. 187, 193 (1995).

⁵⁷ Stafford, *supra* note 7, at 267.

⁵⁸ 42 U.S.C. §§2000a-2000e (1994 & Supp. V 1999). It is not the intent of this writer to provide a full, detailed analysis of the exceedingly complex area encompassed by Title VII. For in-depth analysis of the treatment of criminal records in the employment context under Title VII, see *Consideration of Arrest Record as Unlawful Employment Practice Violative of Title VII of Civil Rights Act of 1964*, 33 A.L.R. FED. 263.

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sex, or national origin.⁵⁹ Under this federal law, a “disparate impact test” is used to proscribe any employment category, tool, or test with an impact or practice of overt discrimination against anyone in those protected classes of people.⁶⁰

For example, African-Americans as a class are arrested and convicted substantially more often than Caucasians.⁶¹ Federal civil rights law will protect an African-American from an employer policy excluding from employment persons who have suffered a number of arrests if that policy has the foreseeable adverse impact of depriving a disproportionate number of African-Americans of employment opportunities.⁶² This is true even if the employer policy is applied equally to all classes or categories of individuals.⁶³ An exception exists when employers are able to defend their use of exclusionary policies for reasons of “business necessity,” where the exclusion is significantly related to job performance.⁶⁴ For

⁵⁹ Leavitt, *supra* note 17, at 1298. The federal government has not included those with a criminal record as a protected class of persons in discrimination legislation. *Id.*

⁶⁰ *Id.*

⁶¹ *Consideration of Arrest Record as Unlawful Employment Practice Violative of Title VII of Civil Rights Act of 1964*, 33 A.L.R. FED. 263 §2[a].

⁶² *Id.* Case law supports the notion that an employer inquiry into arrest records will likely discourage African-Americans from considering a job or submitting an application. *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1298-99 (8th Cir. 1975). Further, the mere request for an arrest record tends to discourage applications by those with arrest records and may induce African-Americans to give false or incomplete answers on an application that would subject them to possible future termination for not answering questions truthfully. Equal Employment Opportunity Comm’n, Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000E et. Seq. at *8 n.8 (1990), available at 1990 WL 1104708.

⁶³ 33 A.L.R. FED. 263§2[a].

⁶⁴ *Id.*

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instance, a hotel may properly dismiss a bellman after finding out that he had prior convictions for theft and receiving stolen goods where the hotel required that employees who have access to valuable property belonging to guests also have a record free from convictions for serious property-related crimes.⁶⁵

The disparate impact analysis was established by the United States Supreme Court in *Griggs v. Duke Power Co.*, where a group of African-Americans were denied promotions because they lacked high school diplomas and could not pass written aptitude tests.⁶⁶ The Court held those requirements unlawful even though African-American and Caucasian employees were subject to the same requirements and the tests were fair in form.⁶⁷ The Court determined that the tests were not related to job performance but instead operated to exclude African-Americans from employment promotions.⁶⁸

Other federal cases prohibit all facially neutral practices that disparately impact minority job applicants. The case of *Gregory v. Litton Systems, Inc.* found unlawful an employer practice of requiring all job applicants to disclose their number of arrests because such a requirement had a disparate impact on African-Americans.⁶⁹ The court relied on substantial evidence indicating that African-Americans are disproportionately arrested more often than Caucasians.⁷⁰ The *Litton* decision is the leading interpretation of the disparate impact analysis that prohibits employer requests for criminal histories from potential job applicants.⁷¹

⁶⁵ *Richardson v. Hotel Corp.*, 332 F. Supp. 519, 521 (E.D. La. 1971) (finding that hotel policy was not discriminatory).

⁶⁶ 401 U.S. 424, 430 (1971).

⁶⁷ *Id.* at 429.

⁶⁸ *Id.*

⁶⁹ 316 F. Supp. 401, 403 (C.D. Cal. 1970).

⁷⁰ *Id.*

⁷¹ *Id.*

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The Equal Employment Opportunity Commission (“EEOC”) has set forth guidelines⁷² as to when an employer may use criminal records in hiring decisions under Title VII of the Civil Rights Act.⁷³ An employer must show a compelling “business justification” for using arrest records.⁷⁴ Employers are made aware that they should not seek to use arrest records for employment decisions because information they obtain from records is more likely than not going to be used, regardless of whether a business justification exists.⁷⁵ The EEOC guidelines then require employers to investigate and determine whether the alleged conduct actually occurred.⁷⁶ Quite possibly in acknowledgment of the complexity of the guidelines, the EEOC guidelines then go one step further and provide explanatory examples of situations where it is appropriate for an employer to use knowledge of an applicant’s criminal history in an employment setting.⁷⁷

An ex-offender who applies for a job has to be aware of employer requirements that seek information about his criminal past. Such requirements can be facially neutral and apply to all applicants equally, even those in minority classes. However, if those requirements tend to have a disproportionate impact on minority applicants and, further, do not seem to fully meet or exceed the EEOC guidelines,

⁷² See Equal Employment Opportunity Comm’n, Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000E et. seq. (1990) (hereinafter, E.E.O.C. Guidance), *available at* 1990 WL 1104708.

⁷³ 42 U.S.C. §§ 2000a-2000e (1994 & Supp. V 1999).

⁷⁴ See E.E.O.C. Guidance at *2.

⁷⁵ *Id.* at *3.

⁷⁶ *Id.* at *5.

⁷⁷ *Id.* at *6. For example, an employer would be justified in denying employment to a black male applicant for a police officer position where he admitted he had been accused but acquitted of burglary. He could be denied the position because his credibility as a witness in future court actions would likely be compromised. *Id.*

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then a job applicant denied employment because of his criminal history can challenge the requirement. Successful disparate impact challenges are exceedingly rare today; there has not been one upheld by a Federal Appeals Court since 1975.⁷⁸ Given the complexity of the government rules and guidelines and the likelihood of losing an appeal of a disparate impact challenge, applicants with a criminal history who have endured a violation of their civil rights may just accept the job loss or denial of employment and move on, likely falling yet again into the recidivism trap.

V. State Statutory Schemes Affecting Ex-Offender Employment

A. Eight States Have Anti-Discrimination Laws Affecting Ex-Offender Employment

State legislatures have begun enacting statutes that prohibit the discriminatory use of an ex-offender's criminal record in an employer's hiring decisions. In the vast majority of states, the prohibitions found in Title VII of the federal Civil Rights Act⁷⁹ are the only restrictions as to when an employer may use an applicant's criminal record in an employment setting.⁸⁰ An eight-state minority has statutorily dealt with employment discrimination against

⁷⁸ *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1298-99 (8th Cir. 1975). The Eighth Circuit upheld a disparate impact claim against Missouri Pacific, which followed a policy of denying employment to all applicants who had ever been convicted of a crime other than a traffic offense. The court held that such a policy was too broad to justify its effects on African-American applicants who were rejected at a rate 2.5 times that of white applicants. *Id.*

⁷⁹ 42 U.S.C. §§ 2000a-2000e (1994 & Supp. V. 1999).

⁸⁰ Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283, 286 (2006).

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ex-offenders; forty-two states still allow employers to use criminal records in hiring decisions.⁸¹

One state in the eight-state minority, Wisconsin, has explicit provisions barring all discrimination in an employment setting based on criminal records. Under Wisconsin state law, any “employer, labor organization, employment agency, [or] licensing agency” is prohibited from using criminal records to discriminate against an applicant in employment settings.⁸² In *Wal-Mart Stores, Inc. v. Labor and Industry Review Commission (“LIRC”)*⁸³ the Wisconsin appellate court found that an employee may be fired or denied employment based on his criminal record only if the crime of which he was accused or convicted is “substantially related” to the duties he would perform at the employment.⁸⁴ In *Wal-Mart v. LIRC*, Wal-Mart learned that an employee stock clerk had pending drug possession charges and subsequently fired her.⁸⁵ Wal-Mart defended its action by arguing that because the employee’s job as a stock clerk entailed access to many members of the general public, she could use that access to not only use but distribute drugs.⁸⁶ The court, however, found no evidence that the defendant had any substantial opportunity to

⁸¹ The eight states are Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New York, Pennsylvania, and Wisconsin. See CONN. GEN. STAT. § 46a-80 (2005); HAW. REV. STAT. § 378-2, -2.5 (2003); 775 ILL. COMP. STAT. 5/2-103 (2005); MASS. GEN. LAWS ch. 151B, § 4(9) (2005); MINN. STAT. § 364.03 (2005); N.Y. CORRECT. LAW §§ 750-755 (McKinney 2005); 18 PA. CONS. STAT. § 9125 (2005); WIS. STAT. § 111.335 (2005).

⁸² WIS. STAT. § 111.321. Hawaii has a similar statute, at HAW. REV. STAT. § 378-2.5, providing that employers can request criminal conviction records if the conviction is reasonably related to the employment description.

⁸³ *Wal-Mart Stores, Inc., v. Labor and Indus. Review Comm’n*, 220 Wis. 2d 716 (Wis. Ct. App. 1998).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 717.

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distribute or use drugs in the workplace.⁸⁷ Evidence showed that since Wal-Mart had policies of continuing drug testing and daily security checks of employees, in addition to highly structured workday requirements, the defendant had no particular opportunity for repeat criminal behavior.⁸⁸ The court succinctly noted that if an individual cannot stock shelves at Wal-Mart because of her criminal past, then large groups of people with criminal pasts would be prevented from working at large numbers of employment opportunities.⁸⁹ Simply put, if an ex-offender cannot find work at Wal-Mart doing menial labor, where can she work?

Massachusetts state law prohibits an employer from seeking criminal histories for an arrest that did not result in a conviction,⁹⁰ a first misdemeanor conviction for “drunkenness, simple assault, speeding, minor traffic violation, affray, or disturbance of the peace;”⁹¹ or any misdemeanor conviction that occurred five years or more before the date of employment application.⁹² Noteworthy in the Massachusetts statute is the distinction between arrest records and conviction records.⁹³ Depending on the type of record, an employer may be provided with very different types of information regarding an applicant.

Massachusetts courts have narrowly construed the state anti-discrimination statute. In *Bynes v. School Committee of Boston*,⁹⁴ the Massachusetts Supreme Court found that

⁸⁷ *Id.*

⁸⁸ *Id.* at 718.

⁸⁹ *Id.*

⁹⁰ MASS. GEN. LAWS ANN. ch. 151B, § 4(9)(i) (West 1996 & Supp. 2002).

⁹¹ *Id.* at ch. 151B, § 4(9)(ii).

⁹² *Id.* at ch. 151B, § 4(9)(iii).

⁹³ *Id.* at ch. 151B, § 4(9)(i).

⁹⁴ 581 N.E.2d 1019, 1021 (Mass. 1991). Plaintiffs filed an action against the School Committee of Boston, who had requested their criminal records from the Commonwealth of Massachusetts Criminal History Board, an agency independent of the Boston School Committee. The Court held that statutory prohibitions against release

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the school district could use criminal records where the prior conviction had occurred more than five years earlier.⁹⁵ The school district employment application had not asked directly for criminal records, but the district had employed a third party to investigate its employees.⁹⁶ The defendants in *Bynes* were fired school bus drivers.⁹⁷ The Court seems to add a layer of protection to schoolchildren from bus drivers with criminal pasts even if their convictions were prior to the statutory limitation.⁹⁸ The unregulated use of third-party investigators in Massachusetts arguably weakens the statute and provides only narrow protection for ex-offenders seeking to maintain gainful employment.

Other states have enacted civil rights legislation similar to that found in Massachusetts. In Illinois, for example, an employer may not use a sealed or expunged criminal record as a basis for hiring decisions.⁹⁹ Rhode Island does not allow an employer to inquire whether an applicant has even been accused or charged with a crime but does allow an employer to ask whether an applicant has ever been convicted of a crime.¹⁰⁰ Michigan law specifically allows an employer to seek information from an applicant about any felony charges even if a conviction has not resulted, but prohibits requesting information about any

of records of convictions more than five years earlier and of arrests without convictions applied only to protect employees from requests from their employers and did not prevent employers from seeking the same information from other sources. *Id.*

⁹⁵ *Id.* at 1022.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1020.

⁹⁸ *Id.* at 1023. Finding the Commonwealth of Massachusetts Criminal History Board was responsible for unauthorized disclosure of criminal records and finding no fault on the part of the Boston School Committee. *Id.*

⁹⁹ 775 ILL. COMP. STAT. ANN. § 5/2-103 (West 2001). Like Massachusetts, the Illinois statute provides an exception for criminal history use by a state agency.

¹⁰⁰ R.I. GEN. LAWS § 28-5-7(7) (2000).

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misdemeanor charges not resulting in conviction.¹⁰¹ In brief, when an ex-offender explores state statutes to find that some forbid considering all types of criminal histories¹⁰² and others only prohibit considering arrest records or discrimination in licensing,¹⁰³ he is likely to realize some protection against discrimination from state statutes even though consistency among states is not uniform.

B. New York's Progressive Statute Stands Alone as the Strongest State Enactment

The state of New York has a strong public policy of rehabilitation for ex-offenders through employment.¹⁰⁴ Evidence of this policy can be found in New York anti-discrimination legislation that is precisely and effectively tailored to deal with the civil rights of ex-offenders in an employment setting. New York has three separate statutes that speak to all factors affecting ex-offender employment opportunities, the public policy of the state, and governing guidelines for civil rights in the ex-offender employment setting.¹⁰⁵ Under these state laws, an employer may not discriminate against an applicant because of his criminal history nor any other classification such as race, religion, creed, and sex.¹⁰⁶ Neither may an employer deny employment or licenses to any individual because of his

¹⁰¹ MICH. COMP. LAWS § 37.2205a (2000).

¹⁰² See, e.g., HAW. REV. STAT. §378-2 (1993 & Supp. 2000); WIS. STAT. ANN. § 111.321 (West 1997 & Supp. 2001).

¹⁰³ See, e.g., 775 ILL. COMP. STAT. ANN. §5/2-103 (West 2001); COLO. REV. STAT. §24-5-101 (2001).

¹⁰⁴ Leavitt, *supra* note 17, at 1295; see N.Y. CORRECT. LAW § 752 (McKinney 1987 & Supp. 2001-2002).

¹⁰⁵ N.Y. CORRECT. LAW §§ 752-54 (McKinney 1987 & Supp. 2001-2002); N.Y. CRIM. PROC. LAW § 160.60 (McKinney 1992 & Supp. 2001-2002); N.Y. EXEC. LAW § 296(15)-(16) (McKinney 2001).

¹⁰⁶ N.Y. EXEC. LAW § 296 (McKinney 2001).

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criminal record, regardless of whether he was convicted or acquitted.¹⁰⁷ The statutes, however, do allow law enforcement agencies or employers whose employees must possess a gun in the scope of their employment to request criminal records when hiring.¹⁰⁸ Such statutes are likely to assuage public concern over allowing ex-offenders to be hired as police officers.

New York law expressly states when an employer may deny an employment opportunity as a result of a criminal conviction. Before considering the criminal records of an applicant, an employer must find a “direct relationship” between a prior offense and the employment or license sought.¹⁰⁹ In making this determination, an employer is required to look at a list of factors, including the duties and responsibilities of the job that the applicant seeks, the time elapsed since the crime, the person’s age at the time of the crime’s occurrence, the seriousness of the crime, and any evidence of the ex-offender’s rehabilitation.¹¹⁰ An employer may deny employment where the applicant’s criminal history indicates that employing him would constitute an “unreasonable risk” to public safety.¹¹¹ New York has a strong public policy of full employment opportunities for ex-offenders as a rehabilitative measure, and that interest is clearly spelled out in the state’s legislation.¹¹²

The judiciary of the state has underscored the public policy of New York in the rehabilitation of ex-offenders through employment opportunities. In *Ford v. Gildin*, the court refused to hold an employer liable for negligent hiring when an employee who had been convicted twenty-

¹⁰⁷ *Id.*

¹⁰⁸ N.Y. EXEC. LAW § 296(16) (McKinney 2001).

¹⁰⁹ N.Y. CORRECT. LAW § 752 (McKinney 1987 & Supp. 2001-2002).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

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seven years earlier for manslaughter molested a child.¹¹³ The court held that it was not foreseeable that an individual who had committed manslaughter over two decades earlier would molest a child so many years later,¹¹⁴ thus affirming the public policy of New York for encouraging employment for ex-offenders.

In *Soto-Lopez v. New York City Civil Service Commission*, a New York district court held even more strongly in support of the public policy of ex-offender employment.¹¹⁵ An ex-offender convicted of manslaughter and drug offenses in *Soto-Lopez* had been denied employment by the city as a caretaker in a housing complex.¹¹⁶ The court found that the denial was a violation of the expressed public policy of the state to encourage ex-offender employment and that the duties of a caretaker were unrelated to the crime underlying the ex-offender's conviction.¹¹⁷

Some New York state courts, however, have been less deferential to the ex-offender's employment plight. The Court of Appeals in *Al Turi Landfill, Inc. v. New York State Department of Environmental Conservation* found no error when state officials denied a landfill expansion permit to individuals who had records of convictions for federal tax-related crimes.¹¹⁸ The court found that dishonesty, lack of integrity in conducting business, and a willingness to mislead the government bore a direct relationship to the duties and responsibilities inherent in operating a landfill for the state.¹¹⁹ *Al Turi* suggests that where a nexus exists—in this case cheating the government out of tax dollars correlated with operating a landfill for the

¹¹³ 200 A.D.2d 224 (N.Y. App. Div. 1994).

¹¹⁴ *Id.* at 229.

¹¹⁵ 713 F. Supp. 677 (S.D.N.Y. 1989).

¹¹⁶ *Id.* at 678.

¹¹⁷ *Id.*

¹¹⁸ 98 N.Y.2d 758, 760 (N.Y. 2002).

¹¹⁹ *Id.*

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government—there is a direct and substantial relationship, and thus the state policy imperative to keep ex-offenders employed is overridden.

New York legislation also takes into account public safety concerns, allowing an employer to reject an applicant when his criminal record indicates that he would present an “unreasonable” public safety risk.¹²⁰ In *Arrocha v. Board of Education*, an individual with a felony conviction for selling cocaine nine years earlier was denied a permit to teach in high schools in New York City.¹²¹ In making its determination, the court considered several factors, including high school teachers serving as role models, the seriousness of the offense, and the state’s specific concern in protecting children from drug dealers, to find the applicant an “unreasonable risk” to public safety.¹²² The court spoke to the state’s strong public policy of encouraging employment of ex-offenders but found the policy was outweighed by the enumerated factors intimating a threat to public safety.¹²³ Thus, New York anti-discrimination laws forbid employers from imposing blanket restrictions of individuals with criminal records but allow some leeway in hiring decisions on a case-by-case basis. Such a policy can be applied evenhandedly so long as courts are not given unfettered discretion in determining what constitutes a reasonable risk.

The statutory scheme in New York recognizes that the growing numbers of ex-offenders entering their communities each year need the support of society and of its laws in order to succeed. In turn, this support leads to safer and more inclusive communities. If this realization is to occur on a national level, a concerted emphasis must be placed on the notion that similarly encouraging the

¹²⁰ N.Y. CORRECT. LAW §752 (McKinney 1987 & Supp. 2001-2002).

¹²¹ 93 N.Y.2d 361, 365 (N.Y. 1999).

¹²² *Id.* at 365.

¹²³ *Id.* at 366.

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employment of ex-offenders is the best policy for the country.

VI. Federal Legislation to Aid in Prisoner Reentry

B. The Second Chance Act of 2007 Programs for Ex-Offender Reentry

Federal legislators have begun to realize that a job is pivotal to ex-offender rehabilitation. The Second Chance Act of 2007: Community Safety Through Recidivism Prevention (“Second Chance Act”),¹²⁴ is a Congressional attempt to provide transition services that will increase the chances that ex-offenders find work after release from prison. In his speech during the Congressional debate on the Second Chance Act, Representative Charles Rangel stated:

[F]inding work after release is not only critical to the ex-offender, his family and the community who relies on him for support, but to the potential victims of crime who never become victims, and the taxpayers who have to pay less in prison and prosecution expenses because one less person is not going back to prison.¹²⁵

The goal of the Second Chance Act is to lower recidivism rates by providing a more normal setting for ex-offenders after release from prison while protecting the public safety and reducing overall costs of incarceration.¹²⁶ Through

¹²⁴ Second Chance Act of 2007, 42 U.S.C. § 17501 (2007).

¹²⁵ 153 CONG. REC. E1644 (daily ed. July 27, 2007) (statement of Rep. Rangel). Representative Rangel brought home the cost to taxpayers in his remarks that “billions of dollars,” spent mostly on prosecuting repeat offenders, are being wasted. *Id.*

¹²⁶ 153 CONG. REC. H8281 (daily ed. July 23, 2007) (statement of Rep. Scott). The number of inmates has increased tenfold since 1980,

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grants to state and local governments, the Second Chance Act will provide transitional services to develop comprehensive plans that promote successful prisoner reentry into communities and reduce recidivism.¹²⁷

In its resolution presented during Congressional debates on the Second Chance Act, the Senate recognized that the transition from incarceration to community reentry is risky for recently released prisoners and that unsuccessful transition has led to “alarmingly high recidivism” rates for ex-offenders.¹²⁸ Importantly, the resolution speaks to the need for effective reentry programs that would reduce recidivism rates,¹²⁹ thus affirming that a successful transition into the community means an ex-offender likely will not re-offend and return to prison. The Senate agreed to help ex-offender reentry through funding for reentry programs and research.¹³⁰

As enacted, the Second Chance Act will allocate funding to provide a broad array of programs and services that would make the transition for ex-offenders easier, in turn reducing recidivism.¹³¹ Nearly \$360 million will be allocated for programs that deliver transitional services, such as job training, education assistance, substance abuse counseling and treatment, and mentoring programs,¹³² to

resulting in increases for annual expenses for corrections from \$9 billion in 1982 to more than \$65 billion today. This cost does not take into account the cost of arrest and prosecution, or the cost to victims.

Id.

¹²⁷ 153 CONG. REC. H8283 (daily ed. July 23, 2007) (statement of Rep. Jones). This first-of-a-kind legislation allocates \$360 million to fund projects that provide ex-offenders with a “coordinated continuum” of “housing, education, health, employment, and mentoring services,” making the transition back into society easier. *Id.*

¹²⁸ S. Res. 45, 110th Cong. (2007) (enacted).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ 153 CONG. REC. H8283 (daily ed. July 23, 2007) (statement of Rep. Jones).

¹³² *Id.*

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help ex-offenders adjust to their new environment upon release from prison. The Second Chance Act funds programs that provide ex-offenders a “coordinated continuum” of employment, housing, health, and other essential services.¹³³

Some ex-offenders will actually be employed under provisions in the proposed Second Chance Act. In her remarks to Congress during debates over the proposed Second Chance Act, Representative Jones stated that Community Reentry is an ex-offender reentry program in her home state of Ohio.¹³⁴ Community Reentry will likely receive funding under the Second Chance Act.¹³⁵ Community Reentry employs ex-offenders as Care Team members, a group that serves elderly people and those with disabilities living in the Cleveland, Ohio, area; Care Team members are paid salaries with full benefits, including vacation, health insurance, and fully vested pension after one year.¹³⁶ The recidivism rate among Care Team members is less than five percent.¹³⁷ Even though jobs created under the Second Chance Act would be few in number, they would nonetheless serve the important objective of keeping ex-offenders employed as a means to reduce recidivism.

The transition services and programs provided under the Second Chance Act go a long way toward providing opportunities for an ex-offender to re-establish himself as a contributing and productive member of the community. One can argue, however, that the Second Chance Act does not provide a wholly complete second chance at life outside prison walls. More than temporary transition services are

¹³³ 153 CONG. REC. H8283 (daily ed. July 23, 2007) (statement of Rep.

Jones).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

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needed if an ex-offender is to truly succeed in reintegrating. An ex-offender needs a job to succeed. Where private employers are either unwilling or unable to help an ex-offender through private employment, and states provide only varying levels of protection against employment discrimination, the federal government should consider public employment as a way to fully assist an ex-offender in his reentry efforts.

VII. Federal Creation of Employment Opportunities

A. A Historical Perspective: Government-Created Employment During the Great Depression

Job creation by the federal government is not a new phenomenon. In the autumn of 1929 the stock market crashed, triggering a severe economic crisis known as “The Great Depression.” Most analysts at that time compared the early years of the depression with economic downturns around the turn of the twentieth century that were short-lived and not too severe; few were able to predict the unprecedented length and severity of the Great Depression.¹³⁸ Statistical predictors of employment showed mounting job losses in late 1931, resulting from the sharp economic downturn, which fueled an interest in radical change to prevent further decline.¹³⁹ In response, the federal government created job programs deemed by its social welfare planners as necessary to close the economic gap and provide employment relief during the economic crisis.¹⁴⁰

¹³⁸ WILLIAM R. BROCK, WELFARE, DEMOCRACY, AND THE NEW DEAL 84-85(1988).

¹³⁹ *Id.* at 85-87.

¹⁴⁰ Philip Harvey, *The Right to Work and Basic Income Guarantees: Competing or Complementary Goals?* 2 RUTGERS J. L. & URB. POL’Y 8, 11, 25 (2005).

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In the early spring of 1935, the Emergency Relief Appropriations Act¹⁴¹ granted the president's request for \$4 billion to general relief programs, including \$1.36 million to fund the Works Progress Administration ("WPA").¹⁴² The aim of the relief program was to provide employment for 3,500,000 persons of the 11,000,000 to 12,000,000 unemployed.¹⁴³ WPA projects were primarily geared toward relieving the plight of the long-term employed but were also designed to encourage employment on a wider scale.¹⁴⁴ The stated purpose of the WPA was to provide useful employment to specific groups of people with particular skills and not to provide employment on federal projects for all the unemployed.¹⁴⁵

The WPA was the federal government's most significant attempt at providing employment for the jobless.¹⁴⁶ As part of the WPA, the federal government allocated funds for diverse programs, such as the expansion of day care for children, which supplied jobs for workers in those programs and included unemployed teachers and nurses, all the way to cooks and janitors.¹⁴⁷ The WPA provided jobs mostly in the construction industry, but it also gave work to unemployed artists and assisted communities in expanding community efforts, such as education, library, health, and related projects.¹⁴⁸ Professional and white-collar workers found employment under the WPA through Federal One Projects, which included the Federal Art Project, Federal Music Project,

¹⁴¹ 15 U.S.C. §712a.

¹⁴² Brock, *supra* note 138, at 271.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 270.

¹⁴⁶ Margaret Bing, *A Brief Overview of the WPA*, <http://www.broward.org/library/bienes/lii10204.htm> (last visited Nov. 8, 2009).

¹⁴⁷ Peter Pitegoff, *Child Care Enterprise, Community Development and Work*, 81 GEO. L.J. 1897, 1911 (1993).

¹⁴⁸ Bing, *supra* note 146.

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Federal Theatre Project, Federal Writers' Project, and the Historical Records Survey.¹⁴⁹

As a short-term program, the WPA restored the morale of large numbers of workers and gave an opportunity to thrive to a significant number of talented people in the arts, entertainment, and scholarship. Supporters of the WPA at the time expressed their view that governments have an obligation to provide work to the unemployed if private employers cannot do so.¹⁵⁰ Most government programs have critics, and those who disliked the WPA included businessmen who feared that the WPA workforce competed unfairly with private industry and organized labor and felt prevailing wages would be undercut.¹⁵¹ In spite of their fears, the WPA was generally considered a success.¹⁵² The WPA and its agencies were disbanded in the early 1940s when World War II wartime production had absorbed most of the unemployed.¹⁵³ The WPA should be regarded as a model for other government efforts to provide employment for individuals such as ex-offenders, who are typically unable to find employment elsewhere.

B. A Present-Day Perspective: Government Employment in the U.S Military

Many readers will be surprised to learn that each year the United States Armed Forces recruits and enlists a significant number of service members with criminal histories.¹⁵⁴ This enlistment of ex-offenders is

¹⁴⁹ *Id.*

¹⁵⁰ Brock, *supra* note 138, at 353.

¹⁵¹ Bing, *supra* note 146.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Michael Boucai, "Balancing Your Strengths Against Your Felonies": Considerations for Military Recruitment of Ex-Offenders, 61 U. MIAMI L. REV. 997, 1000 (2007).

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accomplished through a moral waiver system.¹⁵⁵ In order to enlist in the military, an individual must meet the military's two requirements: voluntariness and capacity.¹⁵⁶ Capacity includes a moral element that generally eliminates people who have a significant criminal history, persons who exhibit behavior or antisocial problems, and prior service members who have received a dishonorable discharge from the military.¹⁵⁷ Ex-felons are a class of people who are statutorily excluded from enlistment.¹⁵⁸ However, the same statute that precludes an ex-felon from enlisting in the military also provides that an ex-felon can enlist in the military.¹⁵⁹ The statute permits the Secretary of Defense to make exceptions for enlistment in "meritorious cases,"¹⁶⁰ the so-called "moral waiver."¹⁶¹

In 2003, branches of the military granted moral waivers to enlistees in the following percentages: Army—4,918 (7.1%), Air Force—2,632 (7.3%), Navy—4,207 (10.4%), and Marines—19,195 (49.6%).¹⁶² Looking at the large number of military recruits and the relatively high percentage with criminal histories, studies have shown that those who enter the military with a criminal past are suitable for military service¹⁶³ and are successfully integrated into the Armed Forces. Ex-offenders must overcome tremendous obstacles to finding and maintaining a job. Many find the option of military service through the

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1001.

¹⁵⁷ *Id.* at 1001-02.

¹⁵⁸ 10 U.S.C. § 504(a) (2006).

¹⁵⁹ Boucai, *supra* note 154, at 1002.

¹⁶⁰ 10 U.S.C. § 504(a) (2006).

¹⁶¹ Boucai, *supra* note 154, at 1002.

¹⁶² *Id.* at 1032 (citing waiver grant figures at U.S. Accounting Office, available at <http://www.gao.gov> (last visited Nov. 6, 2009)).

¹⁶³ *Id.* at 1018.

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moral waiver system a means to finding and securing worthwhile employment in spite of those barriers.¹⁶⁴

Finding gainful employment is critical to successful ex-offender reintegration. Society's interest in reducing recidivism could be positively impacted by military recruitment.¹⁶⁵ The military atmosphere removes the chance to commit crime and military training teaches discipline,¹⁶⁶ two factors that may reasonably act to deter future crime. The benefits to society of ex-offender military service are many and should be encouraged as a viable way to reduce rates of recidivism.

Given the extraordinary number of persons with criminal histories seeking jobs, military service necessarily provides employment solutions for a limited number of individuals. In order to serve the dual purpose of lowering the large number of unemployed ex-offenders, which would in turn lower recidivism levels, greater numbers of jobs than those provided by the military must be created.

VIII. Proposed Solutions

A. A Permanent Solution

No single solution will address all the problems inherent in rehabilitating ex-offenders, but it is clear that employment is critical to successful rehabilitation and reintegration.¹⁶⁷ Too often ex-offenders give up their search for legal employment after being subjected to constant employment rejection. Too often, they return to illegal work as their only means of survival. The vast

¹⁶⁴ *Id.* at 1025.

¹⁶⁵ *Id.* at 1027.

¹⁶⁶ *Id.*

¹⁶⁷ May, *supra* note 56, at 188. Facilitating employment opportunities to ex-felons may help lower the recidivism rate. Research indicates that the availability of employment and involvement in crime are inversely related. *Id.*

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majority of states do little to encourage an ex-offender to continue in his quest for gainful employment. New York has taken the lead as the only state to go beyond simply encouraging private employers to hire ex-offenders by expressly prohibiting discrimination based on criminal history without further explanation. The Second Chance Act will go a long way toward providing relief during the critical transitional period immediately after release from incarceration. A successful societal effort to decrease recidivism must couple transitional programs, such as those provided under the Second Chance Act, with a stronger, more definitive federal statutory scheme similar to successful state models, specifically the New York anti-discrimination model, to underscore the need to provide employment assistance for ex-offenders.

B. A Temporary Solution

Until stronger federal anti-discrimination legislation is enacted and combines with the Second Chance Act to act concurrently, the federal government should take action to deal with elevated recidivism levels in a manner similar, but not identical to, the measures that are historically and presently used to address national employment needs in other situations. The recidivism problems created by thirty years of mass incarceration are critical to this nation's future and security, and they need to be addressed with the same fervor and response afforded the severe unemployment crisis during the Great Depression and military recruitment efforts to maintain a strong defensive, albeit voluntary, force.¹⁶⁸ The federal government created jobs for millions of workers hardest hit during the Great Depression by implementing the WPA. The federal

¹⁶⁸ Boucai, *supra* note 154, at 1026 (quoting Rep. Davis that "rehabilitating and reintegrating prisoners" is of primary importance in this country).

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government is currently employing ex-offenders, even ex-felons, in the military. The federal government should enact legislation that would initiate a temporary jobs creation program for ex-offenders in certain circumstances and under certain conditions until future federal legislation can be enacted to adequately and actively prohibit discrimination against a job applicant based on his criminal record.

C. Solution Limitations

This solution of proposed employment for ex-offenders would necessarily have certain limitations. First, work created as a rehabilitative measure should be at-will. An employment contract at-will provides the government as employer and ex-offender as employee a simple solution against future wrongful activities—one can quit and the other can fire.¹⁶⁹ The possibility of losing employment created specifically in his best interests is a powerful incentive for an ex-offender to walk the straight and narrow line toward keeping his job and achieving successful rehabilitation. The inherent freedom found in employment at-will is a fairness presumption and defeats an argument that a just cause must exist. Self-sufficiency and self-reliance are end goals of ex-offender employment, and the freedom of an at-will contract goes a long way toward ensuring that an ex-offender will achieve those twin goals.

Second, an ex-offender should be required to enroll in programs offered under the Second Chance Act. Mentoring programs offered under the Second Chance Act would be particularly important to an ex-offender. When an ex-offender needs someone to talk to or needs advice from a trusted individual, he would likely find someone in a Second Chance Act program to fill that critical need.

¹⁶⁹ Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 979 (1984).

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Further, the Second Chance Act monitoring programs would help an enrolled ex-offender fulfill stringent requirements, such as attending regular drug counseling sessions and showing up for work on time. If an ex-offender as a public employee fails to meet the requirements of the Second Chance Act programs, he would be terminated from his at-will employment under the proposed solution. Enrolling in Second Chance Act programs would provide an ex-offender more than adequate support for his reentry attempts and must be a part of any proposed solution to recidivism problems.

Finally, this public job creation program should be temporary. Temporary employment in the private setting can and often does lead to permanent employment. An ex-offender who has proven his credentials to future employers because of his success at his temporary government job should not be precluded from being hired outside the public employment realm.

D. Possible Reactions to Proposed Temporary Solution

No one condones criminal activity. Some would argue that providing public employment to ex-offenders is like turning a blind eye to crime and will take jobs away from non-offending, law-abiding citizens. Public employment programs are most necessary when severe economic times exist,¹⁷⁰ but the need here is not strictly economic, as was the case during the Great Depression. A law-abiding citizen has an undoubtedly far greater chance of being successful in his job search than does an ex-offender. Furthermore, when jobs are created for ex-offenders, the negligible effect on the availability of jobs for law-abiding

¹⁷⁰ Harvey, *supra* note 140, at 26. During times of depression, public employment “should be regarded as a principal line of defense.”

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citizens pales in comparison to the societal good that occurs when ex-offenders are employed.

There are those who would argue that a work creation program would be too costly and would strain the federal budget. As noted herein, the cost of doing nothing to lower mass incarceration rates and prevent recidivism from spiraling out of control is far greater than any impact that temporary jobs would have on the public coffers. The upfront cost of incarceration of one individual can be as much as \$40,000 per year,¹⁷¹ while the social and economic costs of crime to the community are nearly immeasurable. Most likely an ex-offender would not earn anywhere near \$40,000 per year in a temporary, government-created employment position. Lowering the costs to the community due to a reduction in crime should stand alone as worthy of the cost of a job creation program for ex-offenders. The good to society evidenced by an active, involved, and productive ex-offender on a stable path to recovery is invaluable and should be promoted.

IX. Conclusion

Men and women leaving prison and returning to the community deserve a second chance to turn their lives around, to support a family, to pay taxes, and to be self-sufficient. Records of Congressional proceedings show that “[t]ransitional jobs programs have proven to help people with criminal records to successfully return to the workplace and to the community, and therefore can reduce recidivism.”¹⁷² During a Congressional debate on the Second Chance Act, Representative Davis of Illinois, a co-sponsor of the bill, said that Congress should be prepared to

¹⁷¹ 153 CONG. REC. H8280 (daily ed. July 23, 2007) (statement of Rep. Davis).

¹⁷² 153 CONG. REC. H13566 (daily ed. Nov. 13, 2007) (reading of H.R. 1593 sec.3(19)).

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do two things to assist individuals recently released from prison in their efforts to re-enter the community they had left behind.¹⁷³ First, Congress should provide necessary funds for ex-offender drug treatment if needed.¹⁷⁴ Representative Davis then clearly and unequivocally stated that Congress needs to “find work for ex-offenders.”¹⁷⁵ The Second Chance Act will undeniably provide a plethora of programs that will ease the transition from incarceration into civilian life for a significant number of people each year. Transition programs by their very nature, however, can only go so far in ensuring a successful reintegration for ex-offenders. As Representative Davis succinctly stated, “Programs don’t supply jobs.”¹⁷⁶

America can fight crime and reduce recidivism rates. To be effective at both, the federal government should create temporary jobs for ex-offenders until stronger and more precise federal anti-discrimination legislation can be enacted that will ensure greater employment chances for ex-offenders. Our society should make a concerted effort to ensure that employment opportunities make an ex-offender’s road to reentry as smooth as possible. When society paves a path to employment for ex-offenders, public policy objectives are met and, importantly, individual needs are underscored. Ex-offenders deserve to have society look “not at their past, but at their potential.”¹⁷⁷

¹⁷³ 153 CONG. REC. H5691 (daily ed. May 23, 2007) (statement of Rep. Davis).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Posting of Ezekiel Edwards to DMI blog: *The Rough Road to Reentry*, http://www.dmiblog.com/archives/2006/04/the_rough_road_to_reentry_html.